

DEPARTMENT OF SAFETY

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INTER-DEPARTMENT COMMUNICATION

TO: Curtis N. Duclos, Administrator and Bureau Personnel
DATE: September 22, 2008
FROM: John J. Barthelmes, Commissioner
SUBJECT: Technical Advice Memorandum **BOH-08-01**

History

RSA 265-A :42 V (b) requires the Department of Safety to advise the person of the right to request an [alcohol program completion] hearing and requires the person to request the hearing within 20 days of receipt of the [department's] notice. The statute does not mandate rejection or denial of untimely requests. *(In contrast RSA 265-A:31 mandates denial by the Department of untimely requests for Implied Consent hearings).*

In December 2004, the Department of Safety had recodified the Alcohol Program Completion Hearing rules. The rules are found generally in Saf-C 204.20 and one of the changes requires a person who disagrees with the Impaired Driver Intervention Program's (IDIP) recommendation to request a hearing "within 20 days". Further, hearing requests received after 20 days are required to be denied.

Saf-C 204.20 Alcohol Program Completion Hearings.

(a) Any person who attends an approved alcohol program as required by RSA 263:65-a, and is diagnosed during the final exit evaluation with substance abuse, alcohol abuse, or alcohol dependence may request a hearing within 20 calendar days if s/he does not agree with the diagnosis and/or further counseling requirements.

- (b) Hearings may be requested by writing to the department of safety, bureau of hearings, 33 Hazen Drive, Concord, NH 03305 within 20 calendar days. Requests received after 20 days shall be denied.

(RSA 263:65-a has been repealed. It was replaced and recodified at RSA 265-A:42)

The rule is somewhat vague regarding precisely what triggers the beginning of the twenty days. This rule's application using the exit evaluation as the beginning date has resulted in denying a certain group of persons due process. Curiously, the denial of due process occurs when the person decides that they will comply with the treatment recommendation of the IDIP. When a person agrees to comply, time is spent with a counselor, at self help meetings or with some other form of treatment or abstinence and the twenty days comes and goes. The Licensed Drug and Alcohol Counselor issues a report and recommendation which is submitted to the IDIP representative. If the recommendation is accepted and a letter of completion is issued all is well. If the recommendation is disputed or disagreed with, the person has no recourse because the twenty-day rule is (and must be) strictly applied

There is no alternative hearing that could be *lawfully* scheduled to accommodate the person's right to recourse or due process. Record Review hearings are authorized, but the concern would be the following. If a Record Review Hearing were scheduled, the competing recommendations would be reviewed by the presiding hearing examiner along with possibly the testimony of disagreeing experts. A decision would be made and if the decision were to reject the IDIP's position in favor of restoration of driving privileges and relicensure the person would be back on the road. If the person then caused a fatal crash, there are legal theories imposing personal liability on the hearings examiner who authorized and held a hearing where there was a crystal clear lack of authority to do so, not to mention a public relations situation for the Department.

The reason the TAM is necessary is to clarify the date the twenty days begins so

that persons who intend and attempt to comply with the IDIP recommendation will not be unfairly and unreasonably denied a hearing. In part, the theory of clarifying the right to hearing is that the rejection of the LADAC's recommendation imposes a new requirement on the person that was not included in the initial exit evaluation requirement.

This is the Head of the Agency's interpretation of the law for all concerned, administrators of the law and the public. It is to provide due process.

Technical Advice Memorandum

The event which now triggers the beginning of the twenty calendar days to request a hearing pursuant to RSA 265-A: 42 V and Saf-C 204.20 (a) and (b) is the date of the exit evaluation. The date an IDIP rejects a request by a person to approve their completion of the IDIP based on the recommendation by a Licensed Alcohol and Drug Counselor (LADAC) after attempted compliance with exit evaluation requirements begins a new twenty days to request a hearing.

This Technical Advice Memorandum (TAM) is issued pursuant to Saf-C 102.061, and is binding upon all members of the Bureau of Hearings. Pursuant to RSA 541-A: 16 H (a), it shall be made available to the public and should be filed within your Saf-C 200 series rules or in a separate file for reference.

Approved by:



John J. Barthelmes, Commissioner